

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN BALLARD, III
Claimant

VS.

NORTHCUTT, TRAILER & EQUIPMENT
Respondent

AND

COMMERCE & INDUSTRY INS. CO.
Insurance Carrier

Docket No. 1,030,560

ORDER

Respondent and its insurance carrier (respondent) request review of the December 28, 2006 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The Administrative Law Judge (ALJ) found that the claimant established it was more probably true than not that he was injured while working for respondent, and that the injury occurred in the course of his employment.¹ The ALJ then awarded claimant temporary total disability (TTD) benefits beginning October 24, 2006 until further order, or until the claimant is released to substantial gainful employment or released with light duty restrictions which the respondent is willing to accommodate. The ALJ also appointed Dr. Jon Parks to be the authorized treating and ordered the respondent to pay the outstanding bills from Dr. Parks and the Parklane Pharmacy.

The respondent requests review of whether the injury alleged by the claimant arose out of and in the course of employment and whether the ALJ exceeded her authority and/jurisdiction in granting benefits. Simply put, respondent argues that claimant is

¹ ALJ Order (Dec. 28, 2006) at 1.

generally not a credible individual, his description of an injury is vague and imprecise so as to further erode his credibility. And that Dr. Paul Stein has opined that he could not state within a reasonable degree of medical certainty that claimant's injury was caused by his employment.² Respondent also argues that even if claimant sustained a work-related injury, that it was willing to provide accommodated duty for claimant. But claimant failed to provide respondent with appropriate off-work slips and was terminated for his failure to report to work. Thus, respondent argues that the ALJ's Order granting medical treatment and/or TTD benefits should be reversed.

Claimant has not filed a brief, but would presumably argue that the ALJ's preliminary hearing Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant worked for respondent as a parts delivery man from November 7, 2005 until September 11, 2006, when he was fired. His job required him to pick up, deliver, load and unload a variety of weights averaging 30 pounds.

On July 12, 2006, the claimant went to the ER complaining of chest pain, claimant indicated to the treating physician that he had been having pain in his arm/shoulder for at least six months. He testified that he mentioned his shoulder was hurting, but the main reason was for his chest pain.³ Claimant was treated for inflammation around his heart and was released.

Then on July 31, 2006, the claimant was in the process of warming up his delivery truck and experienced pain in his neck, shoulder and arm. He informed his supervisor and respondent sent him to HMA Medworks, an occupational facility. Claimant advised that he was performing repetitive lifting activities at work. After some diagnostic tests, claimant was referred to Dr. Theo Mellion for a neurosurgical consultation. Dr. Mellion saw claimant on August 7, 2006.

Based upon an MRI, Dr. Mellion diagnosed a disc protrusion at C6-7. He further noted that the claimant had pain in his neck and right upper extremity. He opined that the claimant should try conservative treatment for the pain first and if no improvement occurs a C6-C7 anterior cervical discectomy and interbody fusion would be performed. Claimant

² P.H. Trans., Resp. Ex. 1 at 5-6.

³ *Id.* at 22.

was taken off work effective August 8th for two weeks until September 15th and was sent to therapy. Claimant was then referred to Dr. Jon Parks.

Claimant met with Dr. Parks on September 25, 2006 for a pain consultation and was diagnosed with a cervicgia and bilateral upper extremity radicular symptomatology with a history of C6-7 disc protrusion and C4-5 disc bulge. Dr. Parks proceeded to give the claimant a C6-7 steroid epidural injection. Claimant was instructed to stay off work for two more weeks.

Although respondent initially treated this claim as compensable, respondent now maintains claimant cannot identify any specific work-related event which gave rise to his symptoms and therefore, he did not sustain any work-related accident. In addition, respondent maintains claimant's job did not involve repetitive lifting of items of any significant weight, as evidenced by the unaudited job inventory provided at the preliminary hearing. In the alternative, respondent contends it was able to accommodate claimant's restrictions. But because claimant failed to tender the off-work slips issued by Dr. Mellion, it properly terminated claimant for his failure to stay in contact with his employer.

Claimant saw Dr. Paul Stein at respondent's request on November 7, 2006. Included within the materials sent to Dr. Stein were claimant's earlier medical records. These records include statements from several medical providers which suggest that claimant tends to magnify his symptoms. Upon questioning, claimant reported pain in his neck extending into the right upper extremity and down to his low back. He also noted numbness and tingling in both arms and hands. Following his examination and a review of claimant's previous medical records, Dr. Stein concluded the following:

. . . In terms of causation, heavy lifting of the type reportedly done by Mr. Ballard [claimant] (but apparently denied by his employer in a conversation with a physicians assistant in the treatment records) can be causally related to disk herniation in the cervical spine, although disk herniation in the cervical spine occurs frequently without specific injury. Given the lack of a specific incident, his previous history, and some difficulties with credibility, I cannot state within a reasonable degree of medical probability and certainty that there is a casual relationship between his employment at Northcutt and his current symptoms.⁴

He ultimately concluded that although he found no evidence of lower back injury, claimant should have a cervical MRI and EMG/NCT of the paraspinal muscles and right upper extremity. Dr. Stein assigned temporary work restrictions of avoid repetitive overhead activity, and avoid lifting more than 50 pounds with a single lift to twice a day, 40 pounds more often.⁵

⁴ *Id.*, Resp. Ex. 1 at 5-6.

⁵ *Id.*, Resp. Ex. 1 at 6.

Before respondent's issues can be considered, this Board Member must first determine whether there is jurisdiction for this appeal. K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.⁶

Here, respondent disputes whether this claimant suffered an accidental injury and whether that injury arose out of and in the course of his employment with this respondent. Thus, there is jurisdiction to consider this aspect of respondent's appeal.

Following the preliminary hearing, the ALJ issued an order granting claimant's request for treatment and TTD benefits. In this order, she specifically found that claimant is a credible witness. The resolution of this claim necessarily turns upon the claimant's credibility. Other medical providers have labeled him as a symptom magnifier. That perception has been adopted by respondent's physician, Dr. Stein. Respondent believes claimant to be vague and untruthful because claimant cannot identify a specific date or job task involved in his alleged accident.

This member of the Board finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representative testify in person. In granting claimant's request for medical treatment and TTD the ALJ expressly found that claimant was more credible than Ms. Johnston. This Board Member concludes that some deference may be given to the ALJ's findings and conclusions because she was able to judge the witnesses' credibility by personally observing them testify. Thus, that portion of the ALJ's preliminary hearing Order which finds claimant sustained an accidental injury arising out of and in the course of claimant's employment with respondent is affirmed.

⁶ See K.S.A. 44-551.

This Board Member also finds that there is no jurisdiction to consider that portion of the ALJ's Order that grants TTD benefits. Although respondent asserts that the ALJ exceeded her jurisdiction in awarding such benefits, there is no showing that the ALJ exceeded her authority in any way. Simply because respondent is displeased with the outcome, does not indicate the ALJ exceeded her authority. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁷ Accordingly, respondent's appeal is dismissed as to the issue of TTD.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁸ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated December 28, 2006, is affirmed in part and dismissed in part.

IT IS SO ORDERED.

Dated this _____ day of February 2007.

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Elizabeth R. Dotson, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

⁷ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

⁸ K.S.A. 44-534a.